

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

77-1315

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1315

UNITED STATES OF AMERICA,
Appellant

-v-

PAUL LABRIOLA and THOMAS CONTINO,
Appellees.

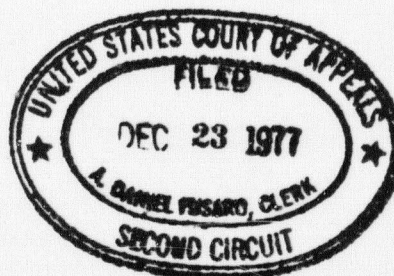
PETITION FOR REHEARING

DAVID G. TRAGER
United States Attorney,
Eastern District

THOMAS P. PUCCIO
Attorney-in-Charge
Organized Crime Strike Force
Eastern District of New York

BERNARD J. FRIED
Assistant United States Attorney

LAWRENCE H. SHARF
Special Attorney
Of Counsel



B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Number 77-1315

UNITED STATES OF AMERICA,
Appellant,

- against -

PAUL LABRIOLA and THOMAS CONTINO,
Appellees.

PETITION FOR REHEARING

PRELIMINARY STATEMENT

The United States of America petitions for rehearing of the decision in this case entered on November 10, 1977 by a panel of this Court, which affirmed an order of the United States District Court for the Eastern District of New York (Costantino, J.), entered on June 28, 1977, granting the motion of defendant-appellees Labriola and Contino to dismiss Indictment 75 CR 659(S) on the ground that the government violated the Interstate Agreement on Detainers.

In its unofficial and unreported opinion accompanying the affirmance in open court, the panel agreed with the District Court holding that the government was estopped from raising the question of retroactivity of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), cert. granted, 98 S.Ct. 53 (1977), because of the agreement to defer decision on the motion in order to obtain some guidance from this Court's prospective decision in Mauro.^{1/} The panel further held that the government would not be permitted on appeal to factually distinguish Labriola's and Contino's cases from Mauro, because of its failure to develop the distinctions properly in a legal argument in the court below.^{2/} We do not by this petition challenge either of these holdings, and accept for purposes of this petition that the outcome of this appeal should be governed by the result in Mauro even though subsequent decisions have cast doubt on the proposition that the defendant's rights under the Interstate Agreement on Detainers had been violated.^{3/}

1/ The Honorable Henry Bramwell recently has ruled that Mauro is not to be applied retroactively from the date of this Court's decision. Genovese v. United States, Docket No. 76 C 1720 (EDNY, November 1, 1977).

2/ As the opinion recognized, distinction between the facts of Mauro and Labriola had been raised orally on several occasions. It is not quite true that no distinction ever was suggested with respect to Contino. At the May 12, 1976 proceeding, the prosecutor did raise the possibility that Contino's return to state custody within the same day might distinguish his situation from Mauro. (Tr. May 12, 1976, p. 10, A 70).

3/ See United States v. Chico, 558 F.2d 1047 (2d Cir. 1977); United States v. Ford, 550 F.2d 732, 742 (2d Cir.), cert. granted, 98 S.Ct. 53 (1977); Genovese, supra.

However, as discussed below, it is our contention that this panel should not have decided this matter without awaiting the Supreme Court's decision in Mauro, upon which the Government's petition for a writ of certiorari was granted on October 3, 1977. The Government never agreed to be bound by this Court's decision in Mauro, as urged by the defendants, and we see no justification for placing Labriola and Contino in a more favorable position than Mauro, Fusco and Ford would enjoy if the Supreme Court should rule against them.^{4/}

REASON FOR GRANTING THE PETITION

This Court rejected the Government's request to defer disposition of the appeal pending the Supreme Court's decision in Mauro, stating (unreported op. at 3):

Finally, we are disinclined to delay our decision pending the Supreme Court's opinion in Mauro. We believe the defendants have waited long enough.

However, we fail to see any prejudice suffered by the defendants because of this delay. The indictment against them was dismissed by the district court on June 28, 1977, and the defendants have been free of any restraints imposed by these charges since that time. Uncertainties remain whenever the government prosecutes an appeal from an order dismissing an indictment, but it has never been

^{4/} A petition for a writ of certiorari in Ford, supra was granted on the same date as Mauro, and the arguments were ordered consolidated. Fusco is Mauro's codefendant.

held that the government should be barred on that basis from appealing adverse decisions. On the contrary, both the Speedy Trial Act and the Plan for Prompt Disposition of Criminal Cases of the United States District Court for the Eastern District of New York provide for exclusion of the period of delay caused by the taking of an interlocutory appeal. 18 U.S.C., §3161(h)(1)(D); Eastern District Transitional Plan, Rule 9(a)(1)(D).

Moreover, it makes little sense to place the defendants in a more favorable position than is enjoyed by Mauro himself. Mauro was indicted in November 1975, arraigned in early December of that year, and secured dismissal of his indictment on May 17, 1976. United States v. Mauro, 414 F.Supp. 358 (E.D.N.Y.), aff'd., 544 F.2d 588 (2d Cir. 1976), cert. granted, 98 S.Ct. 53 (1977). If the Supreme Court decides to reverse and reinstate the indictment, there would be no impediment to proceeding with the trial of his case. Labriola and Contino were indicted on September 8, 1975, the superseding indictment was filed on March 29, 1976, they were arraigned the next day, and the agreement to defer the matter pending appellate disposition of Mauro was entered into on May 12, 1976. Labriola and Contino therefore have waited no longer than Mauro, and we submit that it is neither just nor equitable to confer upon them greater rights.

The defendants have argued here that the parties

all agreed only to await this Court's disposition of Mauro, suggesting that it therefore would be unfair to await the Supreme Court's decision (Brief for Appellee Labriola at 20-22; Brief for Appellee Contino at 8). They contend that it would be unjust to ask them to waive their speedy trial rights any longer. However, as noted earlier, the Government is not asking the defendants to waive any such right because there is presently no indictment against them, and it is extraordinary to suggest that a defendant's consent is necessary or relevant to a government appeal from an order dismissing the indictment.

We further submit that there is nothing in the records to show, and it would be unreasonable to conclude, that the parties specifically agreed to rely solely on the Circuit decision no matter what further developments would occur in the appellate process. The proceedings on May 12, 1976 commenced with indications from Judge Costantino that he disagreed with Judge Bartels and was inclined to deny the motion and proceed to trial (Transcript, May 12, 1976, pp. 3-7, A. 63-67). Counsel for Contino suggested that this would be a waste of everyone's time in a lengthy trial if Mauro were affirmed, and proposed instead that the indictment be dismissed since it would be reinstated in the event

of a reversal (Id. at 7-8, A 67-68).^{5/} Following a discussion of possible similarities and distinctions with Mauro, Judge Costantino then proposed to "(p)ut this case over until such time the Court of Appeals does decide the motion." (Id. at 13, A 73). The prosecutor replied, "I have no objection to that." (Id.). Neither the prosecutor nor the defendants ever mentioned a possible further appeal to the Supreme Court; it simply was not considered. If this Court's decision in Mauro had proved favorable to the Government, the defendants would have been free to request a further delay pending Supreme Court review, and certainly could not be deemed to have waived the benefits of a hypothetical Supreme Court decision in their favor if that had followed such a reversal of Mauro here.

As a matter of common sense, when parties agree to be guided or controlled by an intermediate appellate court's decision in another pending case, the agreement necessarily contemplates the ultimate outcome of the case, not the result in that one court if further review is allowed. The object of such an agreement is to obtain definitive clarification of a disputed point of law, not to gamble on how

^{5/} If this suggestion had been adopted, in ordinary course the appeal would have been decided together or almost simultaneously with Mauro, and presumably the instant case would also be pending decision in the Supreme Court. It is somewhat incongruous for the defense to now claim infringement of speedy trial rights on an agreement strictly limited to the decision of this Court when the original proposal would have left a possible trial date solely to the final outcome of the appellate process.

a particular court will rule.

If the Supreme Court does order a reversal in Mauro, there can be no question that the rights of Labriola and Contino under the Interstate Agreement on Detainers were not violated, and that therefore the indictment against them was improperly dismissed. It is pointless to require the Supreme Court to handle this matter as the only court available to correct that possible departure from its decision, and it is illogical to assert that Labriola or Contino should go free even if Mauro and Fusco must stand trial. We contend, accordingly, that rehearing should be granted and that ultimate disposition of the appeal be held in abeyance pending the Supreme Court's decision in Mauro.

CONCLUSION

The petition for rehearing should be granted and the appeal held in abeyance pending decision by the United States Supreme Court in United States v. Mauro, supra.

Dated: Brooklyn, New York
December 23, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

THOMAS P. PUCCIO
Attorney-in-Charge
Organized Crime Strike
Eastern District of New York

BERNARD J. FRIED
Assistant United States Attorney

LAWRENCE H. SHARF
Special Attorney
Of Counsel

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23rd day of December 19 77 he served a copy of the within
Petition for Rehearing

by placing the same in a properly postpaid franked envelope addressed to:
Carol Mellor, Esq. Steven Hyman, Esq.
188 Montague St. Rm. 903 370 Lexington Ave.
Brooklyn, N.Y. New York, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

23rd day of December 19 77

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 243403380

